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7 **UNITED STATES DISTRICT COURT**
8 **SOUTHERN DISTRICT OF CALIFORNIA**

9 RACQUEL C. BENAS and BENJIE C.
10 BENAS,

11 Plaintiffs,

12 vs.

13 SHEA MORTGAGE INC.; IBM LENDER
14 BUSINESS PROCESS SERVICES, INC.;
15 CHASE HOME FINANCE, LLC; and DOES
16 I - XX, Inclusive,

Defendants.

CASE NO. 11cv1461 - IEG (BGS)

**ORDER DENYING MOTION FOR
TEMPORARY RESTRAINING
ORDER**

17
18 Presently before the Court is Plaintiffs Racquel C. Benas and Benjie C. Benas
19 (“Plaintiffs”)’s motion for a temporary restraining order (“TRO”). [Doc. No. 5.] For the reasons
20 set forth below, the Court **DENIES** Plaintiffs’ motion.

21 **BACKGROUND**

22 This is a mortgage case. Plaintiffs allege they purchased the subject property, located at
23 538 Trovita Court, Escondido, California, on March 13, 2008. [Doc. No. 37, FAC ¶¶ 1, 8.] To
24 fund that purchase, Plaintiffs secured a loan for \$417,000 from Defendant Shea Mortgage Inc.
25 (“Shea”), secured by a Deed of Trust. [Id. ¶ 8.] On February 11, 2011, there was a notice of
26 default on Plaintiffs’ property, [id. ¶ 26], and on May 6, 2011, there was a notice of trustee’s sale
27 stating that the sale of Plaintiffs’ property would take place on June 1, 2011. [Id. ¶ 33.]

28 On May 25, 2011, Plaintiffs filed the present action against Defendants Shea, IBM Lender

1 Business Process Services, LLC (“Seterus/IBM”), and JP Morgan Chase Bank (“Chase”) in San
 2 Diego Superior Court alleging eleven causes of action. [Doc. No. 1-2, Compl.] Plaintiffs also
 3 filed on May 25, 2011 a motion for a temporary restraining order staying the foreclosure
 4 proceedings, which was granted by the state court on May 26, 2011. [Doc. Nos. 1-3, 1-4.] On
 5 July 1, 2011, Defendants removed the action from state court to this Court on the basis of federal
 6 question jurisdiction under 28 U.S.C. § 1331 and supplemental jurisdiction under 28 U.S.C. §
 7 1367(a). [Doc. No. 1, Notice of Removal.]

8 Shortly after removing the action, all three Defendants moved to dismiss the complaint.
 9 [Doc. Nos. 2, 4, 14.] On October 4, 2011, the Court dismissed the complaint and gave Plaintiffs
 10 leave to file a first amended complaint (“FAC”). [Doc. No. 24.] On December 23, 2011, Plaintiffs
 11 filed a first amended complaint alleging seven causes of action for: (1) violation of the Real Estate
 12 Settlement and Procedures Act (“RESPA”), 12 U.S.C. § 2605(a); (2) violation of RESPA, 12
 13 U.S.C. § 2605(e); (3) breach of fiduciary duties under California Civil Code §§ 2923.1 and
 14 2079.24 and California Business and Professions Code § 10176; (4) constructive fraud under
 15 California Civil Code § 1573; (5) fraudulent concealment under California Civil Code §§ 1709-
 16 1710; (6) negligent misrepresentation and concealment under California Civil Code §§ 1709-1710;
 17 and (7) violation of California Business and Professions Code § 17200. [FAC.] By the present
 18 motion, Plaintiffs seek a temporary restraining order enjoining Defendants from (1) foreclosing on
 19 the subject property; (2) offering or advertising the subject property for sale; (3) attempting to
 20 transfer title to the subject property; (4) offering to sell or selling title to the subject property; (5)
 21 holding any auction therefore; and (6) attempting to evict or in any way make Plaintiffs vacate the
 22 subject property. [Doc. No. 51, Pl.’s Mot. at 1-2.]

23 DISCUSSION

24 **I. Legal Standard**

25 The analysis on a motion for a temporary restraining order (“TRO”) is substantially
 26 identical to that on a motion for a preliminary injunction. See Stuhlbarg Int’l Sales Co. v. John D.
 27 Brush & Co., 240 F.3d 832, 839 n.7 (9th Cir. 2001). A preliminary injunction is “an extraordinary
 28 remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.”

1 Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 22 (2008). “A plaintiff seeking a
 2 preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to
 3 suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his
 4 favor, and that an injunction is in the public interest.” Id. at 20. As long as all four Winter factors
 5 are addressed, an injunction may issue where there are “serious questions going to the merits”
 6 and “a balance of hardships that tips sharply towards the plaintiff.” Alliance for the Wild Rockies
 7 v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011).

8 The grant or denial of a preliminary injunction is reviewed for abuse of discretion. Am.
 9 Trucking Ass’ns, Inc. v. City of Los Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009). “[A] district
 10 court necessarily abuses its discretion when it bases its decision on an erroneous legal standard or
 11 on clearly erroneous findings of fact.” Id. “Stated differently, [a]s long as the district court [gets]
 12 the law right, it will not be reversed simply because the appellate court would have arrived at a
 13 different result if it had applied the law to the facts of the case.” Id. (internal quotation marks
 14 omitted).

15 **II. Analysis**

16 **A. Likelihood of Success on the Merits**

17 Plaintiffs argue that they are likely to succeed on the merits of their claims for breach of
 18 fiduciary duty, fraudulent concealment, and negligent misrepresentation. [Pl.’s Mot. at 3-5.]

19 **i. Breach of Fiduciary Duty**

20 Plaintiffs bring a cause of action against Shea for breach of fiduciary duty. [FAC ¶¶ 48-
 21 64.] Under California law, “to plead a cause of action for breach of fiduciary duty, there must be
 22 shown the existence of a fiduciary relationship, its breach, and damage proximately caused by that
 23 breach. The absence of any one of these elements is fatal to the cause of action.” Pierce v.
 24 Lyman, 1 Cal. App. 4th 1093, 1101 (1991).

25 Plaintiffs argue that they had a fiduciary relationship with Shea because Shea is a mortgage
 26 broker, citing California Civil Code § 2923.1. Section 2923.1 provides: “[a] mortgage broker
 27 providing mortgage brokerage services to a borrower is the fiduciary of the borrower.” CAL. CIV.
 28 CODE 2923.1(a). A mortgage loan broker is customarily a person “retained by a borrower to act as

1 the borrower's agent in negotiating an acceptable loan." Wyatt v. Union Mortgage Co., 24 Cal. 3d
 2 773, 782 (1979); see also CAL. CIV. CODE 2923.1(b) ("‘Mortgage broker’ means a licensed person
 3 who provides mortgage brokerage services. . . . ‘Mortgage brokerage services’ means arranging or
 4 attempting to arrange, as exclusive agent for the borrower or as dual agent for the borrower and
 5 lender, for compensation or in expectation of compensation, paid directly or indirectly, a
 6 residential mortgage loan made by an unaffiliated third party").

7 Plaintiffs allege in the FAC that Shea holds itself out as a mortgage banker and states that it
 8 is a licensed real estate broker on its website. [FAC ¶¶ 55-57.] However, Plaintiffs never allege or
 9 present evidence showing that Shea was acting as a mortgage broker for the loan at issue.
 10 Plaintiffs never allege that they or anyone else retained Shea to act as their agent in negotiating
 11 Plaintiffs' loan. Plaintiffs only allege that Shea was the lender of the loan, [*id.* ¶¶ 2, 8], and the
 12 documents attached to the original complaint only list Shea as the lender of Plaintiffs' loan.
 13 [Compl. Exs. 1-5.] "The relationship between a lending institution and its borrower-client is not
 14 fiduciary in nature." Nymark v. Heart Fed. Savings & Loan Assn., 231 Cal. App. 3d 1089, 1093 n.
 15 1 (1991). Absent "special circumstances" a loan transaction is "at arms-length and there is no
 16 fiduciary relationship between the borrower and lender." Oaks Mgmt. Corp. v. Sup. Ct., 145 Cal.
 17 App. 4th 453, 466 (2006) ("the bank is in no sense a true fiduciary"); see also Downey v.
 18 Humphreys, 102 Cal. App. 2d 323, 332 (1951) ("A debt is not a trust and there is not a fiduciary
 19 relation between debtor and creditor as such."). Because Plaintiffs only allege that Shea was a
 20 lender of the loan and not their mortgage broker, Plaintiffs have failed to show a likelihood of
 21 success on their claim for breach of fiduciary duty.

22 ii. Fraudulent Concealment

23 Plaintiffs bring a cause of action against Shea for fraudulent concealment. [FAC ¶¶ 69-72.]
 24 In California, a plaintiff alleging fraudulent concealment must plead five elements: "(1) the
 25 defendant must have concealed or suppressed a material fact, (2) the defendant must have been
 26 under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally
 27 concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have
 28 been unaware of the fact and would not have acted as he did if he had known of the concealed or

1 suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must
 2 have sustained damage.” Kaldenbach v. Mutual of Omaha Life Ins. Co., 178 Cal. App. 4th 830,
 3 850 (2009).

4 Plaintiffs do not allege any facts in the complaint or present evidence showing that Shea
 5 had a duty to disclose the matters allegedly concealed. As explained above, Plaintiffs only allege
 6 that Shea was the lender of Plaintiffs’ loan, and Plaintiffs have not shown that Shea acted as
 7 Plaintiffs’ mortgage broker. “[A] financial institution owes no duty of care to a borrower when the
 8 institution’s involvement in the loan transaction does not exceed the scope of its conventional role
 9 as a mere lender of money.” Nymark, 231 Cal. App. 3d at 1096; see also id. (“[A] lender has no
 10 duty to disclose its knowledge that the borrower’s intended use of the loan proceeds represents an
 11 unsafe investment.”). Accordingly, Plaintiffs have not shown that they are likely to succeed on
 12 their claim for fraudulent concealment against Shea.

13 iii. Negligent Misrepresentation

14 Plaintiffs bring claims for negligent misrepresentation against all three Defendants. [FAC
 15 ¶¶ 73-114.] Under California law, “[t]he elements of negligent misrepresentation are (1) the
 16 misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it
 17 to be true, (3) with intent to induce another’s reliance on the fact misrepresented, (4) justifiable
 18 reliance on the misrepresentation, and (5) resulting damage.” Apollo Capital Fund LLC v. Roth
 19 Capital Partners, LLC, 158 Cal. App. 4th 226, 243 (2007). “In contrast to fraud, negligent
 20 misrepresentation does not require knowledge of falsity.” Id.

21 Further, under Federal Rule of Civil Procedure 9, a Plaintiff must plead a claim for
 22 negligent misrepresentation with particularity. See FED. R. CIV. P. 9(b); Neilson v. Union Bank of
 23 Cal., N.A., 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003) (“It is well established in the Ninth
 24 Circuit that both claims for fraud and negligent misrepresentation must meet Rule 9(b)’s
 25 particularity requirement.”). Under Rule 9(b), “[a] verments of fraud must be accompanied by ‘the
 26 who, what, when, where, and how’ of the misconduct charged.” Vess v. Ciba-Geigy Corp. USA,
 27 317 F.3d 1097, 1103 (9th Cir. 2003) (quoting Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir.
 28 1997)). “[A] plaintiff must set forth more than the neutral facts necessary to identify the

1 transaction. The plaintiff must set forth what is false or misleading about a statement, and why it
 2 is false.’’ Id. at 1106 (quoting In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1548 (9th Cir. 1994)).
 3 “While statements of the time, place and nature of the alleged fraudulent activities are sufficient,
 4 mere conclusory allegations of fraud” are not. Moore v. Kayport Package Express, Inc., 885 F.2d
 5 531, 540 (9th Cir. 1989).

6 Plaintiffs’ allegations in support of its claims for negligent misrepresentation fail to provide
 7 the “who, what, when, where, and how” of the misconduct charged. Plaintiffs only provide
 8 generalized allegations of fraud. Plaintiffs do not specify the specific statements that allegedly
 9 constituted misrepresentations, who specifically made the statements, and where and when the
 10 statements were made. Therefore, Plaintiffs’ allegations fail to satisfy Rule 9(b)’s pleading
 11 requirements, and Plaintiffs have failed to state a claim for negligent misrepresentation.
 12 Accordingly, Plaintiffs have not shown that they are likely to succeed on their negligent
 13 misrepresentation claims.

14 iv. Plaintiffs’ Remaining Claims

15 Plaintiffs’ FAC also contains causes of action for constructive fraud and violations of the
 16 RESPA and the UCL. [FAC ¶¶ 35-47, 65-68, 115-25.] Because Plaintiffs provide no substantive
 17 analysis in their motion demonstrating why they will succeed on these claims, Plaintiffs have
 18 failed to show that they are likely to succeed on these remaining claims. See, e.g., Sarantapoulas
 19 v. Recontrust Co., 2012 U.S. Dist. LEXIS 13467, at *3 (N.D. Cal. Feb. 3, 2012); Shaterian v.
 20 Wells Fargo Bank, 2011 U.S. Dist. LEXIS 62165, at *12 (N.D. Cal. Jun. 10, 2011) (“[A] plaintiff
 21 may not support a motion for a preliminary injunction by merely pointing to his complaint and the
 22 facts alleged therein.”).

23 **B. Immediate and Irreparable Harm**

24 Plaintiffs argue that they will suffer immediate and irreparable harm because without a
 25 TRO Defendants will foreclose on the subject property and evict Plaintiffs from their home. [Pl.’s
 26 Mot. at 3.] Although a loss of one’s personal residence constitutes an irreparable harm, see
 27 Demarest v. Quick Loan Funding, Inc., 2009 U.S. Dist. LEXIS 120251, at *33 (C.D. Cal. Apr. 6,
 28 2009), in the absence of a likelihood of success on the merits, loss of property alone is not

1 sufficient to obtain a TRO.” Jones v. H.S.B.C. (USA), 2012 U.S. Dist. LEXIS 574, at *4-5 (S.D.
2 Cal. Jan. 4, 2012).

3 Moreover, to obtain a TRO the harm must not only be irreparable, but it must also be
4 immediate. See FED. R. CIV. P. 65(b)(1)(A) (“immediate and irreparable injury”). Plaintiffs state
5 in their motion that they will be evicted from their property on June 1, 2011.¹ [Pl.’s Mot. at 3.]
6 This date passed seven months ago without Plaintiffs’ property being sold. The Court recognizes
7 that it is likely that Plaintiffs’ property was not sold on that date because Plaintiffs had obtained a
8 TRO on May 26, 2011 from the state court enjoining the Defendants from selling the property.
9 However, the state court TRO expired several months ago,² and Plaintiffs have not shown that
10 Defendants have scheduled a new trustee’s sale for Plaintiffs’ property. In addition, the fact that
11 Plaintiffs waited seven month from when the action was removed to this Court and the original
12 TRO expired before moving for a new TRO weighs strongly against finding that the alleged harm
13 is immediate. Cf. Lydo Enters., Inc. v. City of Las Vegas, 745 F.2d 1211, 1213 (9th Cir. 1984)
14 (“A delay in seeking a preliminary injunction is a factor to be considered in weighing the propriety
15 of relief.”). Accordingly, although Plaintiffs have shown that they may suffer an irreparable
16 injury, they have failed to show that this injury is immediate.

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21 ¹ The Court notes that this date does not appear to be a typographical error because this date
22 appears to be based on the date of sale for Plaintiffs’ property that was listed on the notice of trustee’s
sale. [Doc. No. 51-1, Declaration of Racquel C. Benas and Benjie C. Benas ¶ 4, Ex. 1.]

23 ² Injunctive orders issued by a state court prior to removal “remain in full force and effect until
24 dissolved or modified by the district court.” 28 U.S.C. § 1450. However, once an action is removed,
25 federal law, specifically Federal Rule of Civil Procedure 65, governs the time limits for the TRO.
Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers, Local No. 70, 415 U.S. 423,
26 426, 435-38 (1974) (Section 1450 does not “create a special breed of temporary restraining orders that
27 survive beyond the life span imposed by state law . . . and beyond the life that the district court could
28 have granted them . . .”). Under Federal Rule of Civil Procedure 65(b)(2), an *ex parte* TRO expires
no later than fourteen days after the date of removal—in this case, July 15, 2011—unless extended by
the court for good cause, or by consent of the adverse party. FED. R. CIV. P. 65(b)(2). Plaintiffs’
counsel states in his declaration that Defendants consented to extending the TRO until September 9,
2011. [Doc. No. 51-2, Declaration of Michael A. Alfred ¶ 2.] However, even assuming this is true,
it would still mean that the TRO expired on September 9, 2011, several months ago.

